No. 16,352

IN THE

United States Court of Appeals

For the Ninth Circuit

CHARLES LARSEN,
Appellant,

vs.

PHIL S. GIBSON, Chief Justice,
Supreme Court of California,
JESSE W. CARTER, Associate Justice,
Supreme Court of California,
Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This is an action under the Federal Civil Rights Act, 42 U.S.C. §§ 1981 *et seq.,* for damages for an alleged denial of due process by the appellees, members of the California Supreme Court. Jurisdiction is predicated primarily upon 28 U.S.C. § 1343, although the appellant also relies upon § 1505 of the California Penal Code as establishing his cause of action. The

appellees moved for summary judgment or to dismiss the complaint, which motion was granted by the District Court on January 13, 1959 (CT 56). A formal order dismissing the complaint on the merits was entered on January 22, 1959 (CT 59). The appellant filed a notice of appeal on January 30, 1959 (CT 64), and his motion to appeal *in forma pauperis* was granted by the District Court (CT 60).

STATEMENT OF THE FACTS.

This is an action under the Federal Civil Rights Act, 42 U.S.C. §§ 1981 *et seq.*, to recover damages for a supposed denial of due process under the color of authority vested in the appellees by virtue of their offices as Chief Justice and Associate Justice of the Supreme Court of California. The District Court is vested with jurisdiction of such cases by virtue of 28 U.S.C. § 1343, regardless of citizenship or the amount in controversy.

The complaint alleges that appellant is a prisoner in the custody of officials of the State of California by virtue of two sentences: The first for burglary in the first degree in 1938 and the second for burglary in the second degree in 1953. Appellant alleges further that on July 3, 1958, he filed a petition for habeas corpus addressed to the appellee, Jesse W. Carter, Associate Justice of the Supreme Court of California, empowered by the laws of California to issue such a writ, and that the petition stated a question of law under the Constitution of the United States. Further,

appellant alleges that the petition was properly filed and that it stated a *prima facie* case. California law requires that all judges authorized to issue the writ of habeas corpus must do so without delay. Appellant concludes, therefore, that Associate Justice Carter had a duty to issue a writ of habeas corpus releasing him from custody.

Appellant alleges this duty was not performed; that the only order in regard to his petition was an order signed by Phil S. Gibson summarily denying his petition for habeas corpus; that this summary disposition did not determine the question of law presented by the petition; and that this summary disposition constituted a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

From the face of the complaint it is apparent that appellant is complaining about the disposition of his petition for habeas corpus by the Supreme Court of California. The appellees filed with their motion to dismiss an affidavit of William I. Sullivan, Clerk of the Supreme Court of California. This affidavit shows that the appellant's petition for a writ of habeas corpus was treated in the normal course by referral from Justice Carter to the Supreme Court as a whole, and that, after consideration, the petition was denied by the Court acting as a whole (CT 50).

This District Court (Honorable Lloyd H. Burke) wrote an opinion disposing of the appellant's complaint on several grounds. First, he held that the Civil Rights Act did not in any way detract from the common law immunity of judges for acts done in the per-

formance of their official duties. Second, he held that the failure of the California Supreme Court to write a formal opinion did not constitute a denial of due process, particularly in view of the fact that another California appellate court had considered and written an opinion with regard to appellant's case, *People v. Larsen,* 144 C.A.2d 504, 301 P.2d 298. Finally, the court held that § 1505 of the California Penal Code which provides for a civil action against judges who refuse "a proper" application for a writ of habeas corpus could not support this action because there was no allegation of diversity of citizenship.

APPELLANT'S CONTENTIONS.

The appellant urges:

(1) That the common law immunity of judges is inapplicable to this case;

(2) That it was a denial of due process for the California Supreme Court not to write an opinion;

(3) That it was a denial of due process for the California Supreme Court to refuse to issue a writ of habeas corpus upon the appellant's application;

(4) That the practice of the California Supreme Court to refer petitions addressed to one member of the Court to the Court as a whole constitutes a denial of due process; and

(5) That the Federal Civil Rights Act (42 U.S.C. § 1981) gives appellant a remedy for these wrongs.

SUMMARY OF APPELLEES' ARGUMENT.

The conduct complained of was privileged; the California Supreme Court was under no constitutional obligation to write an opinion in denying the appellant's petition for a writ of habeas corpus; the appellant's petition did not state grounds for the issuance of the writ; the practice of the California Supreme Court of referring matters addressed to individual justices to the Court as a whole for disposition is well within the powers of the Court in the conduct of its business; and the District Court had no jurisdiction of a cause of action based on § 1505 of the California Penal Code.

ARGUMENT.

I. THE CONDUCT COMPLAINED OF WAS PRIVILEGED.

Even assuming the appellant's petition for habeas corpus was well founded and stated grounds for relief, he would not be entitled to damages from the judges who erroneously ruled adversely to his claim. The Civil Rights Act did not change the common law immunity of judges from suit for any act performed in the course of a matter in which the court had jurisdiction of the subject matter and the parties, *Francis v. Crafts,* Cir. 1, 203 F.2d 809, cert. den. 346 U.S. 845; *Kenney v. Fox,* Cir. 6, 232 F.2d 288; *Peckham v. Scanlon,* Cir. 7, 241 F.2d 761; *Tate v. Arnold,* Cir. 8, 223 F.2d 782; *Ryan v. Scoggin,* Cir. 10, 245 F.2d 54; cf. *Tenney v. Brandhove,* 341 U.S. 367.

The appellant refers to, and relies upon *Picking v. Penn. R. Co.,* Cir. 3, 151 F.2d 240 (1945), which holds in this respect contrary to the authorities cited in the previous paragraph. That decision antedates the Supreme Court's decision in *Tenney v. Brandhove,* 341 U.S. 367, and is no longer considered binding even within the third circuit, *Ginsberg v. Stern,* 125 F. Supp. 596; *United States v. Carson,* 126 F.Supp. 137.

II. THE CALIFORNIA SUPREME COURT WAS UNDER NO CONSTITUTIONAL OBLIGATION TO WRITE AN OPINION IN DENYING THE APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS.

The appellant complains of the failure of the California Supreme Court to explain the basis for its decision denying his petition for a writ of habeas corpus. He has no constitutional right to an opinion. Presumably he is constitutionally entitled to some disposition of his application, but no explanation is required by statute or practice of the California courts. Obviously to impose such a duty would place an impossible burden upon the courts. Furthermore, the appellant has had at least one court opinion on the subject of his present application, *People v. Larsen,* 144 C.A.2d 504, 301 P.2d 298.

III. THE APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS DID NOT STATE GROUNDS FOR THE ISSUANCE OF A WRIT.

Contrary to the appellant's confident assertion, his petition for a writ of habeas corpus was on its face inadequate and did not state grounds for release. His claim was that he had been sentenced in violation of the constitutional prohibition of *ex post facto* legislation. The appellant was first convicted in 1938. The sentence was suspended, and he was placed on probation. In 1947 the California legislature repealed the statute providing for specified "good time" credits for persons *thereafter* incarcerated. In 1953 the appellant was sent to the state prison under the second conviction and the suspension of his first sentence was revoked and ordered to be served concurrently with his new sentence. The appellant's argument is that he is entitled to the "good time" credits because he was convicted prior to the repeal of the "good time" credits statute even though he was never in prison while that statute was in force. The repeal of the good time credit statute was not an increase in the penalty for the crime committed in 1938. It was no more than a recognition that such a statutory schedule of credits was inconsistent with the purpose of the indeterminate sentence procedure. The statute itself did not change the penalty for the crime—it related solely to the administration of the prisons (*In re Nelson,* 185 Cal. 594). Even prisoners incarcerated prior to the repeal acquired no vested rights to credits earned.

IV. THE PRACTICE OF THE CALIFORNIA SUPREME COURT OF REFERRING MATTERS ADDRESSED TO AN INDIVIDUAL JUSTICE TO THE COURT AS A WHOLE IS WELL WITHIN THE POWERS OF THE COURT IN THE CONDUCT OF ITS BUSINESS.

The appellant complains that the practice of the California Supreme Court, as revealed in the affidavit of the Clerk of that Court, William I. Sullivan, in some way infringes upon his rights. Mr. Sullivan stated the practice as follows: "[I]t has been the practice of the Justices of the Supreme Court of California when a matter is presented to any one of them as an individual Justice to refer the matter to the Court as a whole unless unusual circumstances make such a referral inappropriate" (CT 50). The appellant's argument seems to be that this in some way derogates from his right to have a decision from the individual Justice. Such is plainly not the case—any decision by an individual Justice would be reviewable by the Court as a whole, and the practice of the Court is simply a device which avoids unnecessary paperwork and simplifies the procedures of the Court. It in no way deprives the appellant of his right to a decision.

V. THE DISTRICT COURT HAD NO JURISDICTION OF A CAUSE OF ACTION BASED ON § 1505 OF THE CALIFORNIA PENAL CODE.

To some degree, which is not entirely clear, the appellant relies on § 1505 of the California Penal Code. This statute provides:

> "If any judge, after a proper application is made, refuses to grant an order for a writ of habeas

corpus, or if the officer to whom such writ may be directed, refuses obedience to the command thereof, he shall forfeit and pay to the person aggrieved a sum not exceeding five thousand dollars, to be recovered by action in any court of competent jurisdiction."

It has already been shown that the appellant's petition was not a "proper" application within the meaning of this statute, but in any event it is apparent that the District Court would not have jurisdiction over a claim based on this statute in the absence of proper allegations of diversity of citizenship, which are not alleged here. Without diversity of citizenship the appellant has no right to sue in the federal courts on a state cause of action.

CONCLUSION.

For the foregoing reasons the judgment of the District Court dismissing the appellant's complaint should be affirmed.

Dated, San Francisco, California,
March 26, 1959.

Respectfully submitted,

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